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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

NO. 527

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, THE HONORABLE FRANCIS G. CAFFEY, Judge of the United States District Court for the Southern District of New York, and ALUMINUM COMPANY OF AMERICA, a corporation, Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF ALUMINUM COMPANY OF AMERICA

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PREVIOUS OPINIONS AND ORDERS.

The opinion of the Circuit Court of Appeals (R. 323-327), denying its jurisdiction to entertain the petition for a writ of mandamus, is reported in 164 F. 2d 159. The earlier opinion of that court, ruling upon the merits of the anti-trust charges, is reported in 148 F. 2d 416. It partially affirmed and partially reversed the rulings of the District Court which are reported in 44 F. Supp. 97.

The postponement of proceedings in this Court because of the absence of a quorum of Justices qualified to hear the case is reported in 320 U.S. 708; and the certification and transfer of the cause to the Circuit Court of Appeals in 322 U.S. 716. The petitioner has petitioned this Court at No. 303 Miscellaneous, October Term, 1947, for leave to file a motion for a writ of mandamus substantially identical with the petition for mandamus filed in the Circuit Court of Appeals (R. 1). No ruling on the petition has been announced.

JURISDICTION.

Certiorari was granted by this Court on March 8, 1948, pursuant to jurisdiction conferred upon it by Section 240(a) of the Judicial Code, as amended, 28 U. S. C. §347.

The jurisdiction of the Circuit Court of Appeals is derived from the Act of June 9, 1944, c. 239, 58 Stat. 272 (quoted in full, *supra*, pp. 27-28, and hereinafter sometimes referred to as the Act of 1944) amending Section 2 of the so-called Expediting Act of February 11, 1903, c. 544, 32 Stat. 823, 15 U.S.C. § 29. Its ancillary jurisdiction in mandamus is conferred by Section 262 of the Judicial Code, 28 U.S.C. § 377.

QUESTION PRESENTED.

After a cause has been certified and transferred to a Circuit Court of Appeals pursuant to the Act of June 9, 1944, and the Circuit Court of Appeals has heard an appeal, partially determined the issues certified and transferred to it, reversed the judgment, and remanded the cause for further proceedings not inconsistent with its decision, does the Circuit Court of Appeals have jurisdiction to hear and determine on the merits a petition for mandamus directing the District Court to execute its mandate?

No question is presented concerning the merits of the petitioner's motions for mandamus either in the Circuit Court of Appeals or this Court. Neither is any question before the Court concerning any ruling made by the Circuit Court of Appeals or the District Court on the merits of the anti-trust issues which underlie this case.

COUNTER-STATEMENT.

We believe that the limited jurisdictional issue now before this Court can be brought into better focus if a few words are added to the petitioner's statement.

On April 23, 1937, nearly eleven years ago, the Department of Justice filed a 103 paragraph petition in the District Court for the Southern District of New York, charging Aluminum Company of America (referred to throughout the litigation, and herein, as "Alcoa") and certain individual defendants with innumerable violations of the Sherman Act with respect to both monopolization and restraint of almost every aspect of the aluminum industry. Among other things, Alcoa was charged with monopolization of interstate commerce in no less than sixteen markets and commodities, namely, bauxite, alumina, water power, aluminum ingot, aluminum cooking utensils, aluminum cable, aluminum sand castings, aluminum die castings, aluminum permanent mold castings, aluminum bronze powder, aluminum foil, aluminum extrusions, aluminum pistons, aluminum structural shapes, aluminum sheet, and hard aluminum alloys. Comprehensive charges were added concerning conspiracies with foreign producers in restraint of trade in the foregoing commodities. The Department sought the dissolution of Alcoa and other relief.

Alcoa denied the charges. On June 1, 1938, trial began before Judge Francis G. Caffey and continued until August 14, 1940, twenty-six months without interruption except for summer vacations in 1938 and 1939. The record approximates 58,000 pages. On September 30, 1941, and for nine days thereafter, Judge Caffey delivered his opinion from the bench. He decided all issues involving Alcoa in its favor (44 F. Supp. 97).

Final appellate review was vested in the Circuit Court of Appeals for the Second Circuit under the Act of 1944 due to the absence of a quorum here (320 U.S. 708; 322 U.S. 716).

Such final appellate review by the Circuit Court of Appeals resulted in an affirmance of the District Court on all issues except monopolization of the aluminum ingot market to August 14, 1940. With respect to this issue the cause was remanded to the District Court for further proceedings to determine the necessity for relief in the light of the competitive effect of (1) the aluminum ingot plants built by Reynolds Metal Company since the trial, and (2) the post-war disposal of the war-built aluminum plants owned by the United States Government. The Circuit Court of Appeals was careful not to prejudge the necessity for or the nature of any relief that might be required (148 F. 2d 416, 432, 445-447).

One would suppose from reading page 6 of the brief of the Department of Justice that there were "remaining effects" of the 1940 ingot monopoly which should be dissipated and required some action to "disable" the monopolist. *But that is the very question that the Circuit Court of Appeals said could not and must not be determined until after the disposal of the Government aluminum plants following the war.*

In its opinion (148 F. 2d 416) the Circuit Court of Appeals adjudicated every issue certified and transferred to it except only the ultimate and decisive issue of what relief, if any, should be granted with respect to the ingot monopoly of 1940. Upon that question the Court said (p. 432):

"* * * conditions have so changed since the case was closed, that, as will appear, it by no means fol-

lows, because 'Alcoa' had a monopoly in 1940, that it will have one when final judgment is entered after the war. That judgment may leave it intact as a competing unit among other competing units, * * *."

The Court added (p. 445):

"Nearly five years have passed since the evidence was closed; during that time the aluminum industry, like most other industries, has been revolutionized by the nation's efforts in a great crisis."

The Court said further (p. 446):

"* * * It is as idle for the plaintiff to assume that dissolution will be proper, as it is for 'Alcoa' to assume that it will not be; and it would be particularly fatuous to prepare a plan now, even if we could be sure that eventually some form of dissolution will be proper. Dissolution is not a penalty but a remedy; if the industry will not need it for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency. The need for such a remedy will be for the district court in the first instance, * * *"

Again (p. 447):

"Conceivably 'Alcoa' might be left as it was; perhaps it might have to be dissolved; if dissolved, the dissolution would depend upon how the other plants were distributed."

And more recently (164 F. 2d 159, 162):

"* * * our mandate left undecided the most substantial issue of all: i.e. dissolution; * * * and

the outcome was not even foreshadowed in what we decided."

The petitioner's assertion (brief, p. 6, paraphrasing its petition for mandamus) that "the Congressionally approved disposal program is in its incipiency and has not been substantially executed (R. 3-6)" is directly contrary to the averments of Alcoa's petition filed on March 31, 1947 (R. 27). This is a disputed issue of fact that the District Court was scheduled to hear and decide when the mandamus petition was interposed. The question of whether or not Alcoa's petition is premature cannot be determined except upon the evidence to be adduced at the hearing on that petition. On this point Judge Caffey, in his opinion filed May 28, 1947 (R. 79), said:

"Whether the petition has been filed prematurely, as urged by the plaintiff, cannot be satisfactorily determined from a mere consideration of the petition itself and the arguments advanced pro and con. This can be decided only upon the evidence adduced at the hearing as to presently existing conditions."

We agree with the petitioner (brief, p. 6) that any argument on the merits of the mandamus action is to be avoided in the present proceeding, yet the petitioner's description of its position in the mandamus case (brief, p. 6) is necessarily the statement of an argumentative and disputed position. We caution, purely as an antitoxin, that the correctness of each of the petitioner's contentions in the mandamus case is disputed and will be challenged at the appropriate time. Nor do we believe them to be a correct statement of the proceedings that have been initiated in the District Court; and the trial court has so held (R. 78-79).

ARGUMENT.

Summary.

1. The Circuit Court of Appeals had jurisdiction to issue a writ of mandamus in aid of its outstanding mandate, regardless of whether it had any future appellate jurisdiction in this case: *Delaware, Lackawanna and Western R. Co. v. Rellstab*, 276 U.S. 1 (1928, opinion by Mr. Justice Holmes).

2. Nothing before this Court calls for a ruling as to where future appellate jurisdiction is vested. To decide that issue at this time on the basis of deliberate dicta might well prejudice an orderly review when such an issue is unavoidably presented.

3. The Circuit Court of Appeals and the petitioner have both expressed the opinion that future appellate jurisdiction is in this Court rather than in the Circuit Court of Appeals. We believe the contrary because

(a) The Circuit Court of Appeals has not yet heard and determined either the appeal or the case certified to it;

(b) The statute evidences an intention to create a panel of some permanence within the Circuit Court of Appeals; and

(c) The statutory direction that there shall be no review of the decision of the Circuit Court of Appeals by appeal or certiorari or otherwise strongly suggests that Congress did not intend the case to revert to this Court.

However, we do not believe this issue to be before this Court for decision.

1. The Circuit Court of Appeals Has Jurisdiction in Mandamus as a Means of Enforcing Its Outstanding Mandate.

Like the petitioner, we believe that the Circuit Court of Appeals had jurisdiction to decide petitioner's petition for mandamus.

The issue of lack of jurisdiction was raised by the Circuit Court of Appeals *sua sponte*. Until the decision, we should have supposed that it was free from doubt that a circuit court of appeals had jurisdiction under Section 262 of the Judicial Code, 28 U.S.C. § 377, to issue a writ of mandamus in aid of an outstanding mandate, regardless of any future appellate jurisdiction in the cause. Both the Judicial Code and decisions of this Court, a number of which are cited in the petitioner's brief (pp. 9-11), would seem to confirm such jurisdiction beyond doubt.

Delaware, Lackawanna and Western R. Co. v. Rellstab, 276 U.S. 1, is to us a definitive ruling that such jurisdiction is vested in the Circuit Courts of Appeals. In the *Lackawanna* case a judgment for a defendant in a personal injury case was affirmed by the Circuit Court of Appeals for the Third Circuit, but subsequently vacated by the District Court on the basis of an affidavit by a witness confessing perjury. Thereupon the defendant petitioned the Circuit Court of Appeals for a writ of mandamus to require the District Court to reinstate the judgment which the Circuit Court of Appeals had previously affirmed. The Circuit Court of Appeals dismissed the mandamus petition for lack of jurisdiction, predicated upon the reasoning that if the judgment

were reinstated no further appeal could be taken to the Circuit Court of Appeals with respect to it. This was treated by the Court as a demonstration that jurisdiction in mandamus did not exist because the mandamus could not be said to be in aid of a future appellate jurisdiction. In short, the Circuit Court of Appeals for the Third Circuit—like the Circuit Court of Appeals in the present case—held that, having no future appellate jurisdiction with respect to the judgment, it could not issue a writ of mandamus in support of the mandate issued by it on the prior appeal. This Court reversed, ruling that jurisdiction in mandamus existed to protect the earlier appellate jurisdiction of the Circuit Court of Appeals. It was here ruled (p. 5):

> "As the [District] Court was without jurisdiction to vacate the judgment [the term having expired], mandamus is the appropriate remedy unless to grant that writ is beyond the power of the Circuit Court of Appeals. * * * We perceive no reason to doubt the power of that Court. It had affirmed the judgment of the Court below. * * * Like other appellate courts * * * the Circuit Court of Appeals has power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose. * * * The issue of a mandamus is closely enough connected with the appellate power."

Like the petitioner (brief, pp. 11-13), we do not believe that the principle established in the *Lackawanna* case ceases to be applicable to an alleged deviation from the mandate if that departure is of importance, even "high, perhaps critical, importance", as the Circuit

Court of Appeals phrased it (R. 327; 164 F. 2d. 159, 162). Indeed, the more important the departure from the mandate (a challenged premise), the more urgent the obligation upon the court issuing it to exercise its ancillary jurisdiction in mandamus to protect its outstanding order.

We have found no case which denies to an appellate court jurisdiction to issue mandamus as ancillary to an appellate jurisdiction which it has already exercised. The cases cited by the petitioner at page 11 of its brief clearly do not deny this ancillary jurisdiction to a Circuit Court of Appeals. *Chickaming v. Carpenter,* 106 U. S. 663 (1882, opinion by Mr. Chief Justice Waite), concerned mandamus as an execution process and did not involve an appellate mandate. *Mutual Life Insurance Co. of New York v. Holly,* 135 F. 2d 675 (C. C. A. 7, 1943, opinion per Curiam), was a case where there was no appellate jurisdiction, either past or future. *Barber Asphalt Paving Co. v. Morris,* 132 Fed. 945 (C. C. A. 8, 1904, opinion by Judge Sanborn), was concerned only with whether the pendency of an appellate proceeding was necessary to establish jurisdiction in mandamus and reached the conclusion that it was not. In citing this case in *Ex parte United States,* 287 U. S. 241, 246 (1932, opinion by Mr. Justice Sutherland), this Court recognized that there was power to issue the writ of mandamus in aid of jurisdiction already obtained, as well as power to issue it to correct unauthorized action of the court below, which might otherwise defeat future appellate jurisdiction.

Having jurisdiction to enforce compliance with its outstanding mandate, it seems clear to us that the Circuit Court of Appeals for the Second Circuit should have

decided the petitioner's motion for a mandamus upon the merits of the contention advanced by the Department of Justice that the District Court was not following the mandate of March 28, 1945. This is true even if it be assumed that any further appeal from the District Court will lie only to this Court.

We do not mean to imply any agreement with the petitioner on the merits of its claim that the District Court is not following the mandate. Indeed, we think it perfectly clear that the trial court has faithfully carried out appellate instructions. But that is an argument for another day.

2. Nothing Before this Court Calls for a Ruling as to Where Future Appellate Jurisdiction is Vested.

The petition for mandamus (R. 1) purports to be in aid of the appellate jurisdiction of the Circuit Court of Appeals which culminated in its mandate of March 28, 1945. Inasmuch as the jurisdiction of that court to entertain such a petition to enforce compliance with its outstanding mandate does not depend on the existence of a future appellate jurisdiction, there is no occasion to determine whether it has such a jurisdiction.

The petition for the writ does not predicate jurisdiction on the *future* appellate jurisdiction of the Circuit Court of Appeals. It could not, for nothing has been done which interferes with a full appellate review of anything done by the District Court. The District Court has done nothing to date but set a time for the trial of an issue which we believe to be within the terms of the mandate and the petitioner does not. Conse-

quently, it matters not to the jurisdiction of the Circuit Court of Appeals to entertain the pending petition for mandamus, whether the ultimate appeal from the District Court lies to the Circuit Court of Appeals or to this Court.

The question of future appellate jurisdiction is not raised on this record; and it cannot be answered—regardless of the interpretation placed upon the Act of 1944—until there is an issue ripe for appeal. Only then will we know whether there is at that time in this Court a quorum of Justices qualified to hear such an appeal. Today there is a bare quorum. In the absence of a quorum here, there could be no appellate review unless the Act of 1944 were construed to confer jurisdiction on the Circuit Court of Appeals. If a quorum does exist, then it will be important to know the nature of the proceeding, and the issue that is being appealed from the District Court, in order to determine whether it is within or beyond the scope of the cause already certified and transferred to the Circuit Court of Appeals.

We recognize that it is not necessary to urge this Court not to construe the Act of 1944 in advance of an issue with respect to it. For many years it has been the rule here that this Court should express no opinion concerning the construction of a statute which it does not believe to be necessarily involved in the adjudication of the case before it, even though the lower court may have felt differently and may have placed a construction upon such statute: *Sullivan v. Iron Silver Mining Co.*, 109 U.S. 550, 554 (1883, opinion by Mr. Justice Gray).

Nevertheless, we feel obligated to place before the Court our construction of the Act of 1944, because the Circuit Court of Appeals has done so (R. 324-326; 164 F. 2d 159, 161-162) and the petitioner (although proceeding on a line of reasoning that makes any construction of the statute quite irrelevant) has indulged in some concurring dicta (brief, pp. 7-8).

With all deference, we do not believe that the Circuit Court of Appeals and the petitioner have correctly construed the statute.

3. The Proper Construction of the 1944 Amendment.

(a) *The scope of the certificate.* It will be noted initially that this Court certified and transferred "the cause" to the Circuit Court of Appeals (322 U.S. 716; quoted in full, *infra*, p. 32). This is in harmony with the wording of the statute which repeatedly refers to "the case"—not the appeal—as the object of the certification. (See appendix 1, pp. 27-28, *infra*.)

A reading of the decision of the Circuit Court of Appeals in the case certified to it (148 F. 2d 416), or of the underlying ruling of the trial court (44 F. Supp. 97), makes it perfectly clear that "the case" or "cause" which was appealed to this Court, and then certified and transferred to the Circuit Court of Appeals for final decision, involved every issue that was litigated in twenty-six months of trial, including countless charges of monopolization and restraint as well as the rulings on relief. Those issues—all of them—were certified and transferred to the Circuit Court of Appeals for final decision, 322 U.S. 716.

Later, in denying its jurisdiction in mandamus, the Circuit Court of Appeals sought to narrow the apparent scope of the statute by asserting that it was limited to a decision of "the appeal" (R. 325; 164 F. 2d 159, 161). An examination of the statute reveals that these words, in context, cannot easily be given such a limiting effect. Following the direction that "the case" be certified to the Circuit Court of Appeals, the statute confers jurisdiction "to hear *and determine* the appeal in such case" (see underscored wording in appendix 1, *infra* pp. 27-28).

Far from limiting the jurisdiction of the Circuit Court of Appeals to whatever portion of the case it elects to decide at a single hearing, the Court is granted jurisdiction and twice given directions "to hear *and determine*" the appeal in such case, and once "to hear *and determine*" the case. We submit that jurisdiction is not exhausted—indeed, the duty imposed upon the Court has not been fulfilled—until the Circuit Court of Appeals has determined every issue referred to it by the certification and transfer of the cause. This the Circuit Court of Appeals has not done, for it has remanded to the District Court for further consideration the necessity for relief from the aluminum ingot monopoly which existed until August 14, 1940, but which we maintain has been terminated by war-time and post-war developments (148 F. 2d 416, 432, 445-7). In the later words of the Court (R. 326; 164 F. 2d 159, 162):

> "* * * our mandate left undecided the most substantial issue of all: i.e. dissolution; * * *"

That issue was the most important part of the cause certified by this Court to the Circuit Court of Appeals, and until it has been decided there would seem

to be little basis for an argument that jurisdiction has been exhausted.

The Circuit Court of Appeals assumes that this Court could return the case to it by a second certificate (R. 325, 326; 164 F. 2d 159, 161, 162). This must be on the premise that this Court would then have before it the same case that was on the docket of this Court on June 9, 1944, for it can only certify such cases (*infra*, p. 28, lines 47-49). This premise is a concession that the jurisdiction conferred by the Act of 1944 has not been exhausted because the case which was on the docket of this Court on June 9, 1944—and thereafter certified and transferred—has not yet been "heard and determined."

(b) *The meaning of the last sentence.* The petitioner's comments on the Act of 1944 (brief pp. 7-8) are predicated primarily upon the implications which it reads into the last sentence of the statute, limiting the Act, "to every case pending before the Supreme Court of the United States on the date of its enactment" (*infra*, p. 28, lines 47-49). This, the petitioner suggests, manifests an intention that the Act should be construed as narrowly as possible.

This last sentence was inserted in the bill by amendment proposed by the Senate Judiciary Committee in its Report No. 890 accompanying the bill (quoted in full, *infra*, pp. 29-31). The Committee report comments upon the proposed amendment in the following language:

> "The present personnel of the Supreme Court includes justices who formerly occupied Federal offices in other branches of the Government. Many of these Justices, either directly or indirectly, have been concerned with the subject matter of pending

litigation prior to their appointment to the Supreme Court of the United States. Consequently, in at least two cases, more than three Justices have disqualified themselves so that a quorum cannot be obtained. The committee believes that this situation is extremely unique and is not likely to occur again at any time in the future. The committee therefore recommends that the bill be amended by making this unusual procedure applicable only to a case now pending before the Supreme Court."

The Committee simply decided that the situation was so unusual that it could be assumed that it would not be likely to recur. Plainly there is nothing in the addition of this final sentence, or in the circumstances calling for its inclusion, which suggest that it was intended to bring about any limited construction of what was to be included in the case certified, or that it was calculated to pull back into this Court a case once certified to the Circuit Court of Appeals.

If the Circuit Court of Appeals had referred the case to a master to advise it on post-trial developments which might affect the necessity for or the nature of the relief to be granted, presumably no one would say that the Circuit Court of Appeals had thereby lost jurisdiction to act upon the basis of the master's report. The fact that it utilized the District Court for this supplemental fact finding task ought to bring about no different result.

(c) *The significance of the statutory provision for filling vacancies in the Circuit Court of Appeals' panel.* The Act of 1944 directs the senior Circuit Judge to empanel a court consisting of himself and the two Circuit Judges next in order of seniority. But Congress did something more. It buttressed this provison by a paragraph (*infra*, p. 28, lines 33-45) providing in considerable elaboration for the filling of vacancies in the panel, first from within the Circuit Court of Appeals involved, and then by calling in judges from other Circuit Courts of Appeals. None of this machinery for filling vacancies would be necessary if the Circuit Court of Appeals were to exhaust its jurisdiction upon a single hearing; in that event the senior Circuit Judge would simply empanel the three senior Judges in his court available on that particular day.

The provision for filling vacancies in the panel implies a continuing panel of Judges to pass upon the cause certified and transferred to the Circuit Court of Appeals. It envisions not merely the possibility of a single vacancy in the panel, but of two or more such vacancies. Here we have the strongest evidence that Congress intended a continuing panel of Circuit Judges to pass upon the issues certified and transferred to it.

(d) *The implications of the finality of the rulings of the Circuit Court of Appeals.* To us, the language of the statute most revealing of the legislative intent is the direction that the decision

> "* * * shall be final and there shall be no review of such decision by appeal or certiorari or otherwise."

The Circuit Court of Appeals has affirmed the District Court on all issues but one. How could this Court ever consider the dissolution question without reviewing, and at least casting a gloss upon the ruling of the Circuit Court of Appeals in one or more of the respects in which the trial court was affirmed? Even on a simpler basis, how could this Court pass upon the issue of relief without reviewing what the Circuit Court of Appeals has decided on the merits of the problems which underlie relief?

With all deference, it would appear to be humanly impossible for this Court to pick up this case at the precise point where the Circuit Court of Appeals has left it and from there proceed to decide the issue of relief.

The complexity and variety of the issues which have been raised and adjudicated are only hinted at in the counter-statement (*supra*, p. 4). The disposition of these issues by the District Court is reported in 44 F. Supp. 97, and continues to page 311, a total of 215 pages of double columned fine type. The findings of fact and conclusions of law which followed, required 274 additional printed pages. Everything of consequence was challenged in 107 assignments of error, which alone took up 44 printed pages of the record in the Circuit Court of Appeals. That Court has summarized its position on all of these issues in a mere 33 pages, 148 F. 2d 416-448. A mere reading of the appellate opinion reveals that with respect to most of the issues other than the ingot monopoly, the Circuit Court of Appeals has only revealed its position in summary form. Yet, decision with respect to a demand for dissolution might well involve

most of these same issues in great detail. Obviously, this Court would have to make its own rulings with respect to such details because the Circuit Court of Appeals has only revealed its ultimate position and this in very broad outline.

The Circuit Court of Appeals argued that this problem was no different than the question which always arises upon a plea of *res judicata* (R. 325; 164 F. 2d 159, 161); yet, upon reflection, the problems are fundamentally different. A plea of *res judicata* can be passed upon once it is decided what issues were actually raised and what issues could have been raised within the scope of the pleadings in the first case: *Angel v. Bullington*, 330 U.S. 183, 186, 187 (1947, opinion by Mr. Justice Frankfurter). The second court need not concern itself at all with what the first court decided on the merits of those issues. Moreover, it is under no obligation to bring its own thinking into accord with the earlier decision. It is enough that the second court can mark out the *boundaries* of the issues which were or might have been raised before the first court.

This Court is faced by the Congressional mandate that

> "* * * there shall be no review of such decision by appeal or certiorari *or otherwise*."

This is a sweeping prohibition of *any* review of the Circuit Court of Appeals' decision. The two words last quoted would appear to be specifically calculated to prevent a review by way of commentary upon, interpretation of or supplement to any Circuit Court of Appeals decision. If the Circuit Court of Appeals was worried lest any construction that it placed on its own mandate

could be considered a gloss upon its former opinion and therefore beyond its jurisdiction (R. 325; 164 F. 2d 159, 161-162), how much more imperative it is that this Court refrain from putting itself in a position where it could scarcely avoid making the review which Congress has forbidden.

For example: Suppose that on the trial in the District Court of the question of what relief, if any, is required that Court should hold (contrary to the opinion of the Circuit Court of Appeals, 148 F. 2d 416, 433-434) that Alcoa had purchased bauxite or water power or both for the purpose of monopolization. Undoubtedly, Alcoa could appeal such a judgment. Would anyone deny that an appeal from such a ruling would lie to the Circuit Court of Appeals and nowhere else? It could not lie elsewhere under the Act of 1944, for the decision of the Circuit Court of Appeals cannot be reviewed by any other court. This would seem to be a demonstration that the jurisdiction of the Circuit Court of Appeals has not been exhausted by its decision already rendered in this case.

Upon the basis of judicial notice of the tremendous capacity of the aluminum ingot plants built for the Government and Reynolds Metals Company since the close of the trial, the Circuit Court of Appeals remanded the issue of relief from the ingot monopoly to the District Court for further proceedings, 148 F. 2d 416, 445-447. The District Court was directed to determine the issue on the basis of the competitive impact of the new plants (*ibid.* 446-7). In short, the appellate court spelled out for the trial court the considerations that it must treat as controlling in reaching a decision. Whatever appellate court reviews the eventual decision of the Dis-

trict Court on this issue of relief must necessarily pass upon the correctness of and the weight to be attached to the premises which the Circuit Court of Appeals directed the District Court to treat as controlling. For that reason an appeal from such a decision ought to lie only to the Circuit Court of Appeals if due consideration is to be given to the direction of Congress that no other court shall review in any manner the decision of the Circuit Court of Appeals.

Furthermore, the opinion of the Circuit Court of Appeals bears its own evidence that the remanded issue was an integral part of the case previously certified to the Circuit Court of Appeals. In context with that part of the appellate opinion which remanded the issue of relief for further proceedings (148 F. 2d 416, 445-447), the Circuit Court of Appeals stated that under no circumstances would it be willing to send the case back for another trial (*ibid.* 446). One can only conclude that the remanded issue was considered to be a part of the case previously certified and transferred to it.

There is every evidence that Congress did not intend this case to return to this Court, once it had been certified to the Circuit Court of Appeals under the Act of 1944. It was the case, not the appeal, that was to be certified and transferred; and this was the action taken here. The Circuit Court of Appeals was given both jurisdiction and directions to determine the matters referred to it. This is likewise the only construction consistent with the prohibition of any further review by this Court of the case certified. And it accords with the statutory machinery for filling vacancies in the panel, a precaution

necessarily premised upon a continuing panel in the Circuit Court of Appeals.

Strong support for the construction that a case once certified to the Circuit Court of Appeals cannot thereafter be reviewed by this Court is found in the report of the Senate Judiciary Committee (*infra*, pp. 29-31). It is stated in the report that the bill amends the Expediting Act by adding a provision to meet the situation where there is not a quorum in this Court. Then follows this construction of the legislation (*infra*, p. 30):

> "The bill provides that in such cases the case shall be immediately certified to the circuit court of appeals of the circuit in which is located the district where the suit was brought, and that the decision of such court shall be final without further review."

Surely there can be no doubt that the Judiciary Committee intended that the decision of the Circuit Court of Appeals upon the "case" was to be "final" and "without further review".

(e) *An analogous ruling of this Court.* The Expediting Act of 1903, 15 U.S.C., §§ 28-29, furnishes a close analogy in support of our interpretation of the 1944 Act. Under the Expediting Act, the filing of a certificate by the Attorney General that "the case" is of general public importance requires that such case be given precedence and "assigned for hearing" at the earliest practicable day before at least three judges.

This Court has ruled that such a certificate is not exhausted at the conclusion of the hearing but applies as well to proceedings pursuant to a reversing mandate:

Ex parte United States, 226 U.S. 420 (1913, opinion by Mr. Chief Justice White). That case arose on an action in equity to dissolve the Terminal Railroad Association of St. Louis as a combination in restraint of trade. An expediting certificate was filed and the case heard in the District Court by four Circuit Judges. By a divided court, they dismissed the bill. Upon appeal, the decree of dismissal was reversed and the cause remanded with directions that the Terminal Association be reorganized on a basis outlined by this Court or, failing reorganization, that the combination be dissolved: *United States v. Terminal Railroad Association of St. Louis,* 224 U.S. 383 (1912, opinion by Mr. Justice Lurton). The court below, acting by a single Judge, began proceedings to carry out the mandate of this Court, overruling the suggestion of the Attorney General that under the outstanding expediting certificate a three judge court was required. The single District Judge pointed out that the expediting certificate required only that the case be expedited and that it be "assigned for hearing" at the earliest practicable day before three judges. He found "hearing" to be synonymous with "trial" and concluded that the effect of the certificate was spent after the special court had rendered its decision: *United States v. Terminal Association of St. Louis,* 197 Fed. 446, 448 (E. D. Mo., 1912, opinion by Judge Trieber). The United States petitioned this Court for a writ of prohibition which was granted, it being held here that the expediting certificate had not been spent by the hearing on the merits in the District Court, but continued to be effective with respect to subsequent proceedings in the District Court to carry out the mandate of this Court: *Ex parte United States, supra,* 226 U.S. 420, 425.

The controlling words in the Expediting Act of 1903 are quite parallel to those in the Act of 1944 and the principles of construction which led to the ruling that the expediting certificate included proceedings subsequent to a reversing mandate should be equally applicable to a certification and transfer under the Act of 1944.

Cf. Baltimore & Ohio Railroad Co. v. United States, 279 U. S. 781 (1929, opinion by Mr. Justice Butler), where it was held that the jurisdiction of the three-judge statutory court required to set aside an order of the Interstate Commerce Commission, included power, after mandate from this Court directing the setting aside of such an order, to direct restitution of monies paid under it.

Conclusion.

The petition to the Circuit Court of Appeals for a writ of mandamus (R. 1) was predicated upon the premise that the District Court was disobeying the appellate court's mandate of March 28, 1945. While disputing the soundness of the premise, we see no escape from the fact that the Circuit Court of Appeals had both the jurisdiction and the duty to protect and enforce its outstanding mandate to the District Court. All of this we believe to be fundamental, even though we are convinced that there is not the slightest basis in law or fact for the petitioner's contention that the District Court was in the process of violating the appellate mandate.

The petition to the Circuit Court of Appeals for a writ of mandamus raised no issue that affects the

future appellate jurisdiction either of that court or of this Court. We submit that it would be a mistake to determine that question until such future appellate jurisdiction is either interfered with or invoked.

Respectfully submitted,

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April 8, 1948

APPENDIX 1.

Act of June 9, 1944, c. 239, 58 Stat. 272, 15 U. S. C. § 29

[Underscoring and marginal numbering added]

AN ACT

To amend the Expediting Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act of February 11, 1903, chapter 544, be amended to read as follows:

"In every suit in equity brought in any district court of the United States under sections 1-7 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided, however,* That if, upon any such appeal, it shall be found that, by reason of disqualification, there shall not be a quorum of Justices of the Supreme Court qualified to participate in the consideration of the case on the merits, then, in lieu of a decision by the Supreme Court, the case shall be immediately certified by the Supreme Court to the circuit court of appeals of the circuit in which is located the district in which the suit was brought which court shall thereupon have jurisdiction to hear and determine the appeal in such case, and it shall be the duty of the senior circuit judge of said circuit court of appeals, qualified to participate in the consideration of the case on the merits, to designate immediately three circuit judges of said court, one of whom shall be himself and the other two of whom shall be the two circuit judges next in order

of seniority to himself, to hear and determine the appeal in such case and it shall be the duty of the Court, so comprised, to assign the case for argument at the earliest practicable date and to hear and determine the same, and the decision of the three circuit judges so designated, or of a majority in number thereof, shall be final and there shall be no review of such decision by appeal or certiorari or otherwise.

"If, by reason of disqualification, death or otherwise, any of said three circuit judges shall be unable to participate in the decision of said case, any such vacancy or vacancies shall be filled by the senior circuit judge by designating one or more other circuit judges of the said circuit next in order of seniority and, if there be none such available, he shall fill any such vacancy or vacancies by designating one or more circuit judges from another circuit or circuits, designating, in each case, the oldest available circuit judge, in order of seniority, in the circuit from which he is selected, such designation to be only with the consent of the senior circuit judge of any such other circuit."

This Act shall apply to every case pending before the Supreme Court of the United States on the date of its enactment.

Approved June 9, 1944.

APPENDIX 2.

The report of the Senate Judiciary Committee on the Act of 1944.

Calendar No. 910

78TH CONGRESS 2d Session	SENATE	REPORT No. 890

AMENDING THE EXPEDITING ACT

MAY 19 (legislative day, MAY 9), 1944.—
Ordered to be printed

MR. MCCARRAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 3054]

The Committee on the Judiciary, to whom was referred the bill H. R. 3054, to amend the Expediting Act, having considered the same, report the bill favorably with amendments to the Senate, with the recommendation that it do pass, as amended.

AMENDMENTS

On page 2, line 3, strike out the word "sent" and insert the word "certified".

On page 2, line 5, after the word "brought", insert the words "which court shall thereupon have jurisdiction to hear and determine the appeal in such case,".

On page 2, line 18, after the words "by reason of", insert the word "disqualification".

On page 3, strike out lines 5, 6, and 7 and insert in lieu thereof: "This Act shall apply to every case pending before the Supreme Court of the United States on the date of its enactment."

STATEMENT

The bill amends the present statute which provides for appeals only to the Supreme Court in suits in equity brought under the anti-trust laws in district courts of the United States (sec. 2 of the act of February 11, 1903, 15 U. S. C. 29), by adding a provision to meet the situation in which there is not a quorum of the Court by reason of disqualification of some of the Justices of the Supreme Court.

Since the present requirement for a quorum is fixed at six by a statute enacted in 1863, a quorum cannot be obtained in any case where more than three of the Justices disqualify themselves.

The bill provides that in such cases the case shall be immediately certified to the circuit court of appeals of the circuit in which is located the district where the suit was brought, and that the decision of such court shall be final without further review.

The present personnel of the Supreme Court includes justices who formerly occupied Federal offices in other branches of the Government. Many of these Justices, either directly or indirectly, have been concerned with the subject matter of pending litigation prior to their appointment to the Supreme Court of the United States. Consequently, in at least two cases, more than three Justices have disqualified themselves so that a quorum

cannot be obtained. The committee believes that this situation is extremely unique and is not likely to occur again at any time in the future. The committee therefore recommends that the bill be amended by making this unusual procedure applicable only to a case now pending before the Supreme Court.

APPENDIX 3.

The Certificate of this Court.

[322 U.S. 716]

No. 2. UNITED STATES v. ALUMINUM COMPANY OF AMERICA ET AL. Appeal from the District Court of the United States for the Southern District of New York. June 12, 1944. *Per Curiam*: In this case there is wanting a quorum of six Justices qualified to hear it, see 320 U.S. 708. The cause is accordingly certified and transferred to the Circuit Court of Appeals for the Second Circuit, pursuant to § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U.S.C., § 29, as amended by the Act of June 9, 1944, c. 239, 58 Stat. 272. Reported below: 47 F. Supp. 647.*

* The correct citation of the opinion below is 44 F. Supp. 97.